

# Honor this treaty

*Foreign nationals on death row have the right to contact their home countries.*

**H**umberto Leal Jr. is scheduled to be put to death by the state of Texas next month for the 1994 murder of a 16-year-old girl. Like so many cases involving capital punishment, Mr. Leal has generated controversy, but not for the typical reasons.

Mr. Leal is a Mexican national. When he was arrested, Texas officials failed to advise him of his right to communicate with his country's embassy as required by the Vienna Convention on Consular Relations. The United States, Mexico and some 160 other countries are signatories to the convention.

Mr. Leal is one of roughly 40 Mexican nationals who were not advised about consular access and who sit on death row in this country. Mexico filed a grievance on behalf of its nationals and prevailed in 2004 before the International Court of Justice (ICJ), the judicial arm of the United Nations. The ICJ concluded that the United States was obligated to comply with the treaty and that it should review these cases to determine whether the defendants had been harmed by the lack of notification.

Texas, where the majority of these inmates are held, balked. Three years ago, the state executed Joe Ernesto Medina, another Mexican national who was not informed of his right to consular access and who was denied additional review. The state is likely to take the same approach in the Leal case. "Here, in Texas, if you commit terrible and heinous crimes you're going to pay the ultimate price," says Katherine Ceelinger, press secretary to Gov. Rick Perry (R).

This misses the point entirely. This is not about codifying criminals, nor is it a referendum on the death penalty. It is about a country's obligation to honor its treaty commitments. The United States

# The Washington Post

AN INDEPENDENT NEWSPAPER

## EDITORIALS

TUESDAY, JUNE 14, 2011

be held, and only those who can provide compelling evidence of such harm should be allowed a new trial or benefit from a reduced sentence.

To avoid this problem in the future, federal and state governments should be diligent about abiding by the treaty's mandates. The State Department should continue its outreach to state and local governments to impress upon law enforcement officials the importance of the consular notification. Complying with the treaty is not only the right thing to do; it is the smart and self-interested thing to do.

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must comply with the Vienna Convention — and demonstrate good faith in addressing past mistakes — if U.S. citizens abroad are to be afforded the same rights and protections.

Sen. Patrick J. Leahy (D-Vt.) is expected to introduce legislation as soon as this week to provide meaningful review in federal court for those denied consular access. The legislation should be narrowly tailored and mandate that the legal proceedings focus solely on whether denial of access sectionally prejudiced an inmate's ability to defend against charges. The bar for success should

be high, and only those who can provide compelling evidence of such harm should be allowed a new trial or benefit from a reduced sentence.

To avoid this problem in the future, federal and state governments should be diligent about abiding by the treaty's mandate. The State Department should continue its outreach to state and local governments to impress upon law enforcement officials the importance of the consular notification. Complying with this treaty is not only the right thing to do; it is the smart and self-interested thing to do.

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**Congressional action is needed to ensure the safety of Americans abroad  
and to protect the international reputation of the United States**

**Why is congressional action needed?**

The Vienna Convention on Consular Relations, a treaty ratified by the United States and thus part of U.S. law, ensures the rights of foreign nationals to have access to consular assistance without delay and of consulates to assist their citizens abroad. The United States is currently in violation of its international treaty obligations in the cases of certain Mexican nationals. The International Court of Justice (ICJ) – which the United States designated as the court with jurisdiction to resolve international disputes regarding the Vienna Convention – has determined that the United States can remedy these violations by granting judicial hearings to determine whether prejudice resulted from the failure to provide consular access to the Mexican nationals named in the *Avena* case. In the U.S. Supreme Court's recent decision in *Medellin v. Texas*, the Court agreed unanimously with the Bush Administration that complying with the ICJ judgment is an international legal obligation of the United States. The Court then determined that Congress can act to implement this binding legal obligation across the United States.

**What would the proposed legislation do?**

The proposed legislation would bring the United States into compliance with its international obligations by directing the federal courts to hold a review hearing in these cases to determine whether the defendants were prejudiced by their lack of consular access.

**Congress must act without delay in order to fulfill the United States' treaty obligations and thus ensure the safety of Americans abroad, and to preserve the reputation of the United States as a reliable international partner that respects the rule of law.**

The Bush Administration supports bringing the U.S. immediately into compliance with this treaty obligation. The consequences of non-compliance are potentially far-reaching: if the United States refuses to uphold its treaty obligations, other parties could invoke that non-compliance as justification for ignoring their obligations under the same treaty.

The security of Americans abroad is clearly and directly at risk. The Vienna Convention on Consular Relations is critical to the safety and security of Americans who travel, live and work in other countries around the world: missionaries, Peace Corps volunteers, tourists, business travelers, foreign exchange students, members of the military, U.S. diplomats, and countless others. Being detained by foreign authorities, especially in a country where one does not know the laws or language, can be extremely dangerous to Americans abroad. The United States thus insists that other countries grant Americans the right to consular access. For example, in 2001 when a U.S. Navy spy plane made an emergency landing in Chinese territory after colliding with a Chinese jet, the State Department cited the Vienna Convention in demanding consular visits to the plane's crew. Chinese authorities granted consular visits to the crew members, who were detained in China for 11 days. Throughout the tense standoff, State Department officials repeatedly cited the Convention as the basis for immediate and unobstructed access to the American citizens.

As a nation that believes in the rule of law, the United States must fulfill its undisputed treaty obligations in these cases. Failure to honor our universally-recognized treaty obligations will erode global confidence in the enforceability of the United States' international commitments across a broad range of subjects: foreign relations, international business dealings, trade and investment agreements, and other global affairs.

**Congress should act promptly to adopt legislation implementing the limited remedies that will fulfill the nation's treaty obligations. The minor inconvenience to our federal courts of granting judicial review in the cases of a few dozen Mexican nationals pales in comparison to the threat to the security of American citizens abroad and the potential damage to our standing as a world leader that would result if the United States breaks its promise to live up to its international commitments.**

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LETTER

## Congress and a Treaty

Published: June 22, 2011

**To the Editor:**

Re "The Treaty and the Law" (editorial, June 18):

You are right to urge Congress to pass legislation to require federal courts to review the convictions of certain foreign nationals, including 40 Mexicans, on death row in Texas and other states who were not notified by state officials of their right to speak to a consular officer of their governments, in violation of United States treaty obligations. But you did not mention that review of the convictions of the Mexicans was mandated by a 2004 decision of the International Court of Justice.

In 2005, President George W. Bush ordered Texas and other states to review the Mexican convictions, but the Supreme Court, while acknowledging that the United States is bound under the United Nations Charter to comply with the World Court ruling, held that the president could not order the states to comply without federal legislation.

Some members of Congress may now be reluctant to take action to comply with a World Court decision, but they should recognize, as the Bush administration did, that the United States cannot expect other countries to comply with their treaty obligations to us unless we comply with our treaty obligations to them.

JOHN B. BELLINGER III

Washington, June 19, 2011

*The writer served as the legal adviser for the State Department in the second term of the George W. Bush administration.*

A version of this letter appeared in print on June 23, 2011, on page A25 of the New York edition of the New York Times with the headline *Congress and a Treaty*

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### **Examples of U.S. Government protests of violations of VCCR Article 36 obligations**

*The United States has consistently and vigorously protested denials of prompt consular notification and access in the cases of U.S. citizens detained abroad, citing the requirements of Article 36 of the Vienna Convention on Consular Relations (VCCR). A few of the many available examples are summarized below, with source references.*

#### Incommunicado detention of U.S. nationals in Argentina, 1976

The United States sent a sharply-worded diplomatic protest in 1976 regarding the incommunicado detention and alleged torture of U.S. citizens in Argentina (during the so-called Dirty War, in which thousands of civilians were disappeared and murdered). Then-Secretary of State Kissinger instructed the U.S. Embassy to vigorously protest the denial of prompt consular notification and access guaranteed under the VCCR, directly linked the failure to give “full effect” to the individuals’ right “to request and receive a consular visit” with the mistreatment of Americans in custody, and emphasized the U.S. view that “nothing in local law can override the requirement to advise the American citizen without delay of that citizen’s right under Article 36(1)(b) relating to access.”<sup>1</sup>

#### American Citizens in El Salvador, 1977

In 1977, two American missionaries were detained by Salvadoran authorities for taking a photograph of a police station, which was deemed a “national security installation” during a “state of siege.” Citing VCCR requirements, the State Department lodged a protest note requesting the Salvadoran Minister of Foreign Relations to “elaborate expeditiously” as to “why the two United States citizens were not informed of their right to contact the Consulate...and why the Consulate was not officially informed of the detention of two United States citizens until approximately 28 hours afterward.”<sup>2</sup> Four hours after the Consulate was “officially notified” of the detention, the two Americans were released from custody.

#### Detention of U.S. businessman in Belarus, 2001

In 2001, the United States “strongly protested to the Government of Belarus through diplomatic channels the deportation of U.S. citizen Robert Fielding from Belarus.” Fielding was detained and subjected to a 10-hour interrogation and then summarily deported. In its public statement on the case, the U.S. Embassy emphasized that Belarus “is a signatory to the Vienna Convention on Consular Relations which assures notification, without delay, of home-country consular officers in cases where a foreign national is detained. The Government of Belarus acted with extraordinary haste to see that Mr. Fielding was deported before he could see a U.S. consular officer.”<sup>3</sup>

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<sup>1</sup> The full text of the telegram is *available at* <[foia.state.gov/documents/Argentina/0000A114.pdf](http://foia.state.gov/documents/Argentina/0000A114.pdf)>.

<sup>2</sup> Department of State, *Digest of United States Practice in International Law*, 1977, at 290.

<sup>3</sup> U.S. Embassy Belarus, *Embassy Statement on Detention and Deportation of U.S. Citizen Robert Fielding* (Aug. 29, 2001), *available at* <<http://web.archive.org/web/20060922204928/http://minsk.usembassy.gov/html/fielding.html>>.

Arrest of U.S. reporter in Sudan, 2006

Pulitzer Prize-winning reporter Paul Salopek was arrested in the Sudan when on assignment for National Geographic magazine to the Darfur region. Mr. Salopek was charged with spying, using official information, publishing false news and entering Sudan without a visa. He endured death threats, beatings and lengthy interrogations during his confinement. State Department officials “expressed concern that Sudanese authorities failed to notify the U.S. Embassy, as mandated by the Vienna Convention on Consular Relations, for nine days after Salopek was detained.”<sup>4</sup>

Consular access in Belarus, 2008

Following the arrest and imprisonment in Belarus of American citizen Emanuel Zeltser, the State Department issued a press statement declaring that the authorities “failed to provide timely notification of his arrest, information about his medical condition, and did not inform the U.S. Embassy of his recent transfer to a state psychiatric hospital. Consular access in Belarus has long been a concern for the United States. We urge the Government of Belarus to comply with their international legal obligations and provide immediate and regular consular access to Emanuel Zeltser.”<sup>5</sup> At a meeting with a U.S. congressional delegation in June of 2009 at which the President of Belarus was asked to commute the sentence, the President declared: “If it is very important for America and our relations and contributes to normalising our relations, I will sign the pardon today.”<sup>6</sup> Mr. Zeltser was promptly pardoned and flown home.

U.S. journalists in North Korea, 2009

Two U.S. journalists were arrested in March of 2009 near North Korea’s border with China, on accusations of illegal entry and “hostile acts.” Because the United States and North Korea do not maintain formal diplomatic relations, consular services to U.S. nationals are instead provided by the Embassy of Sweden. After Swedish consular officers were denied prompt and ongoing access to the detainees, a State Department spokesperson declared that “as the Department of State as a whole, there is no higher priority for us than the safety and welfare of American citizens abroad,” adding that the Department was “not aware of any kind of reasons that have been given to us as to why they’re denying the consular access, which, of course, is contrary to the Vienna Convention.”<sup>7</sup>

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<sup>4</sup> Michelle Austein, *Press Freedom Group Calls Journalist's Jailing "Disgraceful"* (Aug. 28, 2006), U.S. Department of State International Information Programs, available at <<http://www.america.gov/st/washfile-english/2006/August/20060828161927hmnietsua0.6934931.html>>.

<sup>5</sup> U.S. Dept. of State Press Statement, *Belarus: Access to Imprisoned U.S. Citizen* (Apr. 14, 2008), at <<http://2001-2009.state.gov/r/pa/prs/ps/2008/apr/103530.htm>>.

<sup>6</sup> Belarusian Telegraph Agency, *Belarus President pardons Emanuel Zeltser* (June 30, 2009), available at <<http://www.belta.by/en/news/president/?id=390027>>.

<sup>7</sup> U.S. Dept. of State, Daily Press Briefing (May 11, 2009), available at <<http://www.state.gov/r/pa/prs/dpb/2009/05/123229.htm>>.